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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRUCE HOCHMAN, Plaintiff and Respondent, v. BERNARD EWELL, Defendant and Appellant.	G046540 (Super. Ct. No. 30-2011-00513743) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy and Kevin L. Vick for Defendant and Appellant.

The Gimino Law Office and Peter J. Gimino III for Plaintiff and Respondent.

* * *

Defendant Bernard Ewell appeals from the denial of his special motion to strike (anti-SLAPP motion; Code Civ. Proc., § 425.16; all further statutory references are to this code) the complaint of plaintiff Bruce Hochman. He argues the court erred in finding the claims did not arise from protected activity. Further, he asserts plaintiff cannot demonstrate he has a probability of prevailing on the merits of its claim. We affirm.

FACTS AND PROCEDURAL HISTORY

Both plaintiff and defendant claim to be experts as to the works of the artist Salvador Dali. In his declaration plaintiff states he is the Director of the Salvador Dali Gallery, as a member of the International Fine Art Appraisers Association has appraised Dali's works for more than 20 years, and, in conjunction with Dali's friend and archivist, published the "Official Catalog of the Graphic Works of Salvador Dali," reputedly the "definitive source."

Specializing in Dali's works, defendant declares he is an "Accredited Senior Appraiser" who has appraised more than 56,000 pieces for at least one museum, a large collector, and several governmental agencies. He has consulted, published, and lectured, and refers to himself as the "Dali Detective" and the "Dean of Fine Art Appraisers." (Boldface omitted.) He also hosts a blog specializing in Dali.

In December 2010 plaintiff sued defendant for defamation and unfair competition, seeking damages and injunctive relief, alleging defendant posted false information about plaintiff on his blog. Shortly thereafter the parties entered into a written settlement agreement in which they each agreed not to post on the Internet any additional statements about the other, generally and as specifically described, and about certain other named parties. Defendant also agreed to remove approximately 55 postings

from his blog, as listed in the agreement. The agreement further stated that if a party breached, the other could obtain an injunction.

Thereafter plaintiff filed this action for breach of contract, seeking damages and injunctive relief, claiming defendant posted additional statements on his blog in breach of the settlement agreement. Defendant then filed the anti-SLAPP motion. In denying the motion the court ruled "[t]he gravamen of the complaint is not defamation, but breach of contract wherein [defendant] voluntarily relinquished any right to post specific statements or references."

Additional facts are set out in the discussion.

DISCUSSION

1. Introduction

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any "cause of action against [that party] arising from any act [the party commits] in furtherance of the . . . right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." An "'act in furtherance of a person's right of . . . free speech under the United States or California Constitution in connection with a public issue' includes: . . . any written or oral statement or writing made in a . . . public forum in connection with an issue of public interest[] or . . . any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(3), (4).)

"The court must engage in a two-step analysis under this section. First it has to determine whether the defendant has met his burden to show '"that the challenged cause of action is one arising from protected activity."' [Citation.] If so, the burden shifts to the plaintiff[] to show the likelihood of prevailing on the claim. [Citation.] '"We

consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" [Citations.]' [Citation.]" (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 714-715.) An order denying an anti-SLAPP motion is reviewed de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Protected Activity

Defendant must show the complaint arises from his exercise of free speech (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67), that is, the "act underlying the . . . cause of action must itself have been an act in furtherance of the right of . . . free speech" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, italics omitted). To determine whether he met his burden we look at the "gravamen of the lawsuit." (*Kronemyer v. Internet MovieData Base Inc.* (2007) 150 Cal.App.4th 941, 947.) "'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been "triggered" by protected activity does not entail that it is one arising from such. [Citation.]'" (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) "'[W]e do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action.'" (*Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679.) "'In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.' [Citation.]" (*Episcopal Church Cases, supra,* 45 Cal.4th at p. 477, italics omitted.)

a. Gravamen of the Action

The parties dispute whether the conduct on which the complaint is based is the breach of the settlement agreement or the blog postings. Defendant contends the speech itself is the the gravamen of the action. But for the postings, there would be no breach of contract claim. In support of his argument he relies principally on *Navellier v. Sletten* (2002) 29 Cal.4th 82. In that case the parties entered into an agreement containing a release of claims provision. Subsequently the plaintiffs filed an action in federal court and the defendant filed counterclaims. The plaintiffs then filed the state court action alleging the defendant breached the agreement when he filed the counterclaims and made misrepresentations in agreeing to the release. Although the court denied the defendant's anti-SLAPP motion, it did hold the defendant had met his burden to show his conduct was protected. (*Id*. at p. 85, fn. omitted.)

The court stated the plaintiffs had sued the defendant because he filed the counterclaims and that "but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, [the] plaintiffs' present claims would have no basis." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 90.) It rejected the plaintiff's assertion the gravamen of the action was "'a garden variety breach of contract and fraud claim'" (*ibid.*) and noted that a complaint "may indeed target both" breach of contract and protected speech (*id*. at p. 92). The statute requires the court to look at the defendant's activity, not the form of the cause of action. Defendant argues *Navellier* requires we look at the postings, not the breach of contract form of the cause of action.

Plaintiff relies primarily on *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301. In that case, in a prior action the defendant, a firefighter, and the plaintiff entered into a settlement agreement wherein the defendant agreed he would not demonstrate or advocate against the plaintiff in support of the firefighters' union. But thereafter the defendant participated in a protest in favor of the union against the plaintiff and refused to comply with the plaintiff's demand he discontinue the activity. The

plaintiff sued the defendant for declaratory relief, among other claims, seeking a declaration the defendant's actions were a breach of the settlement agreement. The plaintiff then filed an anti-SLAPP motion to strike the declaratory relief cause of action under section 425.16, which the trial court denied.

On appeal, the court affirmed, reiterating the rule that, to be subject to an anti-SLAPP motion, the underlying cause of action must be based on protected conduct or speech. (*City of Alhambra v. D'Ausilio, supra,* 193 Cal.App.4th at p. 1307.) It is not enough that the speech caused the action to be filed. (*Ibid*.) Rather, in deciding the motion the trial court must "'distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity.' [Citation.]" (*Ibid.*, italics omitted.)

As to the case before it, the court ruled the defendant sued the plaintiff "because it believed he breached a contract which prevented him from engaging in certain speech-related conduct and a dispute exist[ed] as to the scope and validity of that contract," not "because [the defendant] engaged in protected speech." (*City of Alhambra v. D'Ausilio, supra,* 193 Cal.App.4th at p. 1308.)

Plaintiff maintains that, as in *City of Alhambra*, the gist of the complaint is whether defendant's speech was a breach of the settlement agreement and the contents of the blogs were merely evidence supporting the cause of action. He asserts the protected speech contained in the blogs only "lurk[s] in the background" but "does not transform [the breach of contract] dispute into a SLAPP suit." (*Episcopal Church Cases, supra,* 45 Cal.4th at p. 478.) Just because the action "'may have been "triggered" by [the blogging] does *not* entail that it is one arising from [protected activity]. [Citation.]'" (*Id* at. p. 477.)

Although at first glance plaintiff's position has some appeal, we are convinced defendant has the better argument. *City of Alhambra* is not as on point as plaintiff wants to believe. There, the scope of the agreement really was the issue, as evidenced by the declaratory relief action. As defendant observes, the disagreement

about the validity of the agreement in *City of Alhambra* "existed *independently* of the defendant's particular speech activities . . . ." But here no one is challenging the existence or terms of the settlement agreement. In fact, in his brief plaintiff specifically acknowledges he is not contesting its validity. The issue is whether defendant's blog posts violated it. Had defendant not posted the blogs in question, there would have been no suit. They are the gist of the action.

b. Publication of Issue of Public Interest in a Public Forum

Defendant has also shown publication of the blogs was in "a public forum in connection with an issue of public interest" or "conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(3), (4).)

First, "Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute. [Citations.]" (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.; *Kronemyer v. Internet Movie DataBase Inc., supra,* 150 Cal.App.4th at p. 950 [Web site providing information about movies, television, and actors accessible to public satisfies this requirement].) Plaintiff does not dispute that defendant's blog is a public forum.

Second, the topic is a matter of public interest, the scope of which must be construed broadly. (*Rivera v. First DataBank, Inc., supra,* 187 Cal.App.4th at p. 716.) "'[A]n issue of public interest' within the meaning of section 425.16, subdivision (e)(3) [and by virtue of identical language, subdivision (e)(4),] is any issue in which the public is interested." (*Nygård, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1042, italics omitted.) Neither party disagrees that Dali is a well-known artist. Defendant calls him "world-renowned" and plaintiff describes the international extent of Dali's works.

"'A statement . . . is made "in connection with a public issue or an issue of public interest" (§ 425.16, subd. (e)(4)) "if the statement or conduct concerns a topic of

widespread public interest and contributes in some manner to a public discussion of the topic." [Citation.]' [Citation.]" (*Rivera v. First DataBank, Inc., supra,* 187 Cal.App.4th at p. 716.) The postings on defendant's blog fall within this definition.

For example, one states "the catalogs of Dali prints always get it wrong and list all intaglio prints as etchings and almost all dealers do as well." (Underscoring omitted.) Another states, "Dali dealers continue to sell good and bad Dali prints and original works. . . . If dealers use one of the 'catalogs' [of one of the self-styled 'experts'] to 'authenticate' a print, they are on very shaky ground. . . . Both Sotheby's and Christie's continue to follow very compromised and dangerous paths to Dali 'authentications' . . . . [T]hey have turned away some pretty fine original Dali artworks and thus tainted the pieces and greatly hurt the sellers." These comments go to study of and expert opinion about authentic and fake Dali works and the market for Dali pieces. Both Sotheby's and Christie's are large, well-known auction houses that deal in high-end pieces. It is safe to assume revelation of a sale of a fake Dali work by either would generate substantial publicity and public discussion. This satisfies the requirement the speech concern a matter of public interest. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 [broadcast of interview with Marlon Brando's housekeeper named as beneficiary in his will matter of public interest]; *Kronemyer v. Internet Movie DataBase Inc., supra,* 150 Cal.App.4th at p. 949 [attempt to have Internet database dealing with movies and television show the plaintiff's producer credits for popular movie issue of public interest].)

Plaintiff argues the postings are limited to defendant's clients and made only "to broadcast the virtues of [defendant's] self-perceived appraisal skills and experience" and that the blog postings do not have the "readership" or "importance" defendant attributes to them. But he provides no evidence to support this contention. Plaintiff further asserts the blogs are primarily in defendant's pecuniary self-interest, and not "informative commentary on widespread fraud in the Dali artwork market," thus

taking them out of the definition of public interest. Although defendant promotes his services, his postings go beyond that.

For example, defendant's declaration states one reason he writes his blog "is to protect Dali fans and collectors from fraud and unscrupulous practices in the market for Dali's works." He attached several newspaper and magazine articles discussing an extensive market of forgeries. In addition, in one blog posting defendant discusses several instances of display and sales of fraudulent Dali pieces in the U.S. and several European countries. Although the post suggests owners and potential buyers should contact him so they can protect themselves, the information is available to anyone reading the blog, whether or not an owner or potential purchaser. Further, while postings discussing defendant's actions in exposing fraud and his extensive testimony as an expert witness are about his own experiences, they are foundation for his claim of expertise. Even if this is defendant blowing his own horn, he is providing information about a topic of public interest. A statement is in the public interest if it "in some manner . . . contribute[s] to the public debate. [Citations.]" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.)

In addition, that defendant advertises his own services does not abrogate the public nature of the postings. In *Wilbanks* the defendant, a "consumer advocate" who established a Web site to warn about viatical services, also "advertise[d her] books" and "derive[d] economic advantages from her advocacy by promoting her books on her Web site." (*Wilbanks v. Wolk, supra,* 121 Cal.App.4th at pp. 889, 894.) Yet the court still found the statements a matter of public interest. (*Id*. at p. 901.)

Likewise, the fact defendant allegedly specifically criticized plaintiff and other persons does not remove the speech from the ambit of public interest. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1367 [discussion on Web site of potential harm from use of silver amalgam subject of public concern even though critical of the defendant]; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23-24 [criticism on Web site of named

prominent plastic surgeon matter of public interest because contributed to public debate about risks and rewards of plastic surgery; site also contained information, advice, and page where readers could add information about their experiences].)

And plaintiff essentially acknowledges the public interest in this topic and the necessity of exposing extensive and long-standing forgeries of Dali's works. His declaration points to his more than 20 years of work "to restore public confidence in Dali artwork by ferreting out forgeries." The complaint makes a similar allegation, noting "a worldwide influx of Dali forgeries" that has "shaken" the "public faith and interest in Dali['s] works."

The cases on which plaintiff relies, *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107 and *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, are inapt. *Du Charme* held a mere announcement on the Internet that defendant had terminated plaintiff's employment was not a matter of public interest because "unconnected to any discussion, debate or controversy." (*Du Charme v. International Brotherhood of Electrical Workers, supra,* at p. 118.) In *Commonwealth* the court ruled an offer of investment services to a very small group of investors in a competing firm did not constitute a matter of public interest. (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc., supra,* at p. 34.) The speech in those cases differs from the speech here.

In sum, defendant met his burden to show the postings were protected activity.

3. Commercial Speech Exemption

Section 425.17, subdivision (c) provides: "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling . . . goods or services, . . . arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of

representations of fact about that person's or a business competitor's business operations . . . or services, that is made for the purpose of obtaining approval for, promoting, or securing sales . . . of . . . the person's goods or services, or the statement . . . was made in the course of delivering the person's goods or services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . ." We construe this section narrowly. (*Rivera v. First DataBank, Inc.*, *supra,* 187 Cal.App.4th at p. 717.)

Plaintiff has the burden to demonstrate the complaint is exempt under this section. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 22-23, 25-26.) He must show all of the following: "(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2)" (*id.* at p. 30), that is, "an actual or potential buyer or customer" (§ 425.17, subd. (c)(2)).

Plaintiff has not shown facts to meet all of these requirements, including number three, that the challenged statements were made to promote defendant's services. While it is true some of defendant's blog postings tout his appraisal services and defendant refers to his extensive appraisal experience in his declaration, the statements that are the basis of the complaint do not mention these or any other services defendant may provide. Instead, they are criticisms of information disseminated by others. If they were, in fact, designed to promote defendant's services, plaintiff has not provided

evidence of it. And plaintiff cannot rely on statements other than those about which he complains to prove this element. (*Simpson Strong-Tie Co., Inc. v. Gore*, *supra*, 49 Cal.4th at pp. 31-32 [alleged offending speech was not speech on which the plaintiff claimed fell within section 425.17].) We will not "allow [the] plaintiff[] to evade the limitations of the statutory text by mere wordplay, especially given our obligation to construe the commercial speech exemption narrowly." (*Ibid*.)

4. Probability of Prevailing

To demonstrate he is likely to prevail on the merits of the complaint, plaintiff must both show the legal sufficiency of the complaint and provide evidence to support a prima facie case capable of supporting judgment in his favor. (*Rivera v. First DataBank, Inc.*, *supra*, 187 Cal.App.4th at p. 718.) Plaintiff has met his burden.

Although defendant's entire argument on this issue is based on the premise plaintiff sued for defamation, the cause of action is for breach of contract. Thus, to make out a prima facie case, plaintiff must show "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The only element in dispute is the alleged breach of the settlement agreement.

In the settlement agreement defendant promised "not to make *any* future Internet postings . . . about [plaintiff], Frank Hunter, Robert Descharnes, Nicolas Descharnes, or Albert Field, including, but not limited to, any reference to The Salvador Dali Gallery, [plaintiff's] Annual Print Price Guide or the Official Catalog of the Graphic Works of Salvador Dali by Albert Field, whether directly by name or by implication or *innuendo* . . . ." (Italics added.)

In the complaint plaintiff set out five specific blog postings he alleged violated the settlement agreement. The first referred to a conversation defendant had

with a client where he told her a "'hard bound catalogue of Dali's sculptures'" was "'unreliable'" and there was no "'information in the book that she could rely on.'" He alleged this statement concerned the Descharneses based on his belief they published the only hard bound catalog of Dali sculptures, which is well known.

The second statement discussed why defendant almost never posted responses to his postings. In part, it was because they "'are the same kind of sleezy, uncredible messages that fill a fat file of e-mails which I frequently received over several years from an individual. . . . I've said in the past that I'll no longer get down into that slime pit.'" Plaintiff alleged the terms "'fat file of e[-]mails'" and "'slime pit'" were used in two of the blogs that were the subject of the first action that were identified in the settlement agreement and which defendant specifically agreed to remove. Plaintiff also alleged readers of the blog would understand to whom and what these statements referred.

The third posting stated "'the catalogs of Dali prints <u>always</u> get it wrong . . . .'" The complaint alleged those reading the blog know this refers to the Field Catalog plaintiff distributes, again a statement in violation of the agreement. In the fourth posting defendant said that one Theresa Franks lied about plaintiff on the Internet and Dali owners likely "'become victims of the humbug "Dali experts" whom Franks supports—in spite of their lack of experience, expertise and morals.'" Plaintiff alleged this "is a continuation" of a posting covered by the settlement agreement and the experts to which it refers are understood to be Frank Hunter and Robert Descharnes.

The final posting stated dealers in Dali's works sell bad as well as good pieces, fail to have plaintiff check their inventory, and if they "'use one of the "catalogs" [or one of the self-styled "experts"] to "authenticate" a print, they are on very shaky ground. Both Sotheby's and Christie's continue to follow very compromised and dangerous paths to Dali "authentications"' by using a "bogus Dali 'expert.'" The complaint alleged this violated the settlement agreement because the catalogs mentioned

include plaintiff's Field Catalog, and that because Christie's relies solely on Nicolas Descharnes as its Dali expert, those reading the blog understood the statement about a "'self-styled "expert"'" to refer to him.

In his declaration in opposition to the motion, plaintiff essentially repeated the offending posts and what he interprets them to mean. This is sufficient evidence to make a prima facie case showing breach of the settlement agreement.

Defendant's arguments to the contrary are not persuasive. He maintains that, because the complaint is based on alleged defamation, regardless of its breach of contract label, the First Amendment limits plaintiff's remedies. But for plaintiff to prevail he is not required to prove the statements are false. The settlement agreement bars any statements about plaintiff and the other listed people, not just false statements. Thus, it is irrelevant whether the postings contain opinion or hyperbole.

Likewise, plaintiff was not required to provide clear and convincing evidence of falsity. As noted, proof of falsity is not an element of breach of contract, despite the fact the complaint alleges the postings were false and misleading. Even if it were a requirement, as shown by the very cases defendant cites, the clear and convincing requirement applies to public figures (*Gilbert v. Sykes, supra,* 147 Cal.App.4th at p. 26) or proof of actual malice (e.g., *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84), neither of which are relevant here.

We also reject defendant's argument plaintiff must show by clear and convincing evidence the statements are "of and concerning" him. This is a defamation action standard, not applicable to this case. As to claim the postings are too vague to show they refer to plaintiff, for purposes of an anti-SLAPP motion plaintiff must show only that the action has "minimal merit." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 93.) He has made such a showing in his declaration. Defendant's objections in the trial court to the declaration based on lack of foundation and competence, hearsay, speculation, and opinion are not well taken.

In a related argument, defendant contends that interpreting the settlement agreement to bar the vague postings, that he characterizes as "'implications'" and "'innuendos,'" would violate the First Amendment, which requires that a waiver of one's right of free speech be clear and compelling. The case on which defendant relies, *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, does iterate that standard for such a waiver but does not apply it to evaluation of the statements themselves, as defendant asserts. Again, at this stage, plaintiff need only show a basic prima facie case. We reject the same claim based on the California Constitution.

Further, defendant's assertion plaintiff cannot sue based on statements about the third parties named in the settlement agreement is misleading. The complaint sets out those blog postings to show defendant's breach and as a basis for the injunctive relief, but plaintiff is not seeking damages based on them.

And, significantly, in *Navellier v. Sletten, supra*, 29 Cal.4th 82, in discussing the so-called "merits prong" of the analysis, the court stated that "a defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP's statute's protection in the event he . . . breaches that contract." (*Id.* at p. 94; see *DaimlerChrylser Motors Co. v. Lew Williams, Inc.* (2006) 142 Cal.App.4th 344, 351, 352 [where the plaintiff sued the defendant for filing protest after the defendant had contractually waived right to do so, engaging in protest "alone is likely sufficient minimum proof to overcome . . . motion"].) *Navellier* held section 425.16 "neither constitutes—nor enables courts to effect–any kind of 'immunity' for breach of a release or of other types of contracts affecting speech." (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 93.)

DISPOSITION

The order is affirmed. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.